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Nos. 81-31, 81-228
and 81-455
IN THE

Supreme Court of the United States

October Term, 1981

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA, *et al.*,

Appellants.

THE LUTHERAN CHURCH-MISSOURI SYNOD, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, *et al.*,

Appellants.

On Appeal from the United States District Court for the Central District of California.

Brief of Appellees, The Lutheran Church-Missouri Synod, St. John's Lutheran Church, and Vivadell Keiser.

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Brief of Appellees, The Lutheran Church-Missouri Synod, St. John's Lutheran Church, and Vivadell Keiser.

I.

COUNTERSTATEMENT OF THE CASE.

Appellee The Lutheran Church-Missouri Synod ("the Synod") is a non-profit membership corporation whose members are Lutheran congregations, a number of which

operate primary or secondary schools. One such congregation is appellee St. John's Lutheran Church. Appellee Vivadell Keiser was a teacher at St. John's Lutheran Church when this litigation commenced.[1]

The Lutheran plaintiffs' complaint for declaratory and injunctive relief against the application of the joint federal-state unemployment tax scheme to schools operated, supervised and controlled by member congregations of the Synod was originally filed in the Superior Court of the State of California for the County of Los Angeles. The action was removed to the United States District Court for the Central District of California by the defendant United States Secretary of Labor (the "Secretary"). The Lutheran plaintiffs sought to enjoin the collection of unemployment taxes as well as the collection of information used by the State of California ("the State") in imposing the tax. The Lutheran plaintiffs argued that the schools operated by Synod members were exempt from the tax on statutory grounds and because imposition of the unemployment tax scheme upon those schools violated the first amendment to the United States Constitution.

In the District Court, the Lutheran plaintiffs' action was consolidated for trial with a similar action brought by the Grace Brethren Church, its pastor, the Christian Unified Schools of San Diego, the Redwood Christian Schools, and a number of individuals variously associated with the foregoing ("the Grace Brethren plaintiffs"). Following trial of this matter, the District Court rendered findings of fact and conclusions of law in favor of the Lutheran plaintiffs and the Grace Brethren plaintiffs. (*See* Jurisdictional Statement of the State of California in No. 81-31 ("State's Jurisdic-

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[1]Appellees the Synod, St. John's Lutheran Church, and Vivadell Keiser will be designated "the Lutheran plaintiffs" herein.

tional Statement"), App. A, p. 1; App. B, p. 45; App. C, p. 49)

The District Court found that all of the Lutheran plaintiffs' schools were either without a separate legal existence from the churches by which they were operated ("Category I schools") or were operated as separate corporations by a church or association of churches ("Category II schools"). The District Court concluded that these two categories of schools were exempted from the unemployment tax scheme by the plain meaning of the statute under consideration. (State's Jurisdictional Statement, App. C, p. 50; App. E, p. 71) The District Court recognized a third category, non-affiliated religious schools, and concluded that the Category III schools, which were operated by the Grace Brethren plaintiffs, were not exempted by virtue of the "plain meaning" of the California statute. (State's Jurisdictional Statement, App. A, pp. 3-15; App. B, p. 50) The District Court held, however, that to apply the unemployment tax scheme to the Category I, II, or III schools would result in entanglement between church and state forbidden by the first amendment to the United States Constitution. (State's Jurisdictional Statement, App. B, pp. 46-47; App. C, pp. 49-50)[2]

The Secretary[3] and the State[4] appealed directly to this Court[5] from the holding of the District Court. Neither appellant challenged the judgment of the District Court insofar

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[2]Since the Lutheran plaintiffs do not operate any Category III schools, plaintiffs have not treated the "equal protection" issues addressed by the State at pp. 31-35 of its amended brief.

[3]*See* Secretary's Jurisdictional Statement, App. G, p. 91a.

[4]*See* State's Jurisdictional Statement, App. I, p. 88.

[5]Pursuant to 28 U.S.C. § 1252.

as it was based upon statutory grounds.[6] (*See* State's Jurisdictional Statement, pp. 11-12 & n.4; Jurisdictional Statement of the Secretary in No. 81-228 ("Secretary's Jurisdictional Statement"), p. 6, n.5)

The Lutheran plaintiffs moved to affirm the judgment of the District Court on the grounds that (i) any issues regarding the proper construction of the unemployment tax statutes were insubstantial after the holding of the Court in *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), and (ii) that the State had specifically disclaimed any intention of bringing before the Court the issue of statutory construction. The Court postponed ruling on the Lutheran plaintiffs' motion until the case could be argued on its merits.

II.
ARGUMENT.

A. The Unemployment Tax Scheme Presents the Potential for Excessive Entanglement Between Church and State.

The first amendment's guarantee that "Congress shall make no law respecting an establishment of religion" is not confined to prohibiting governmental assistance to religion. *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 668, 674 (1970); *Abington School District v. Schempp*, 374 U.S. 203, 216, 217 (1963); *Engel v. Vitale*, 370 U.S. 421, 429, 436 (1962); *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

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[6]Inasmuch as the District Court's judgment in the Lutheran case was based upon its interpretation of the statutes under consideration as well as its holding on the issue of constitutionality, the instant appeal has no effect upon the judgment of the District Court as to the Lutheran plaintiffs.

The establishment clause is violated not only if the government intentionally establishes, sponsors, or financially supports religion, but also if the actions of the government result in an *excessive entanglement* with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970); *United States v. Holmes*, 614 F.2d 985, 988 (5th Cir. 1980).

1. The Unemployment Tax Collection Process Must Result in Excessive Entanglement.

The potential for excessive entanglement was the basis for this Court's finding in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that statutes of Rhode Island and Pennsylvania establishing programs for financial aid to non-public schools were unconstitutional. The statutes of both states provided for surveillance to ensure that the state aid went to support secular education only. Nevertheless, the Court held the statutes invalid, reasoning that the degree of supervision required to guarantee that the subsidized teachers and activities did not promote religion would necessarily offend the establishment clause. With respect to the Rhode Island statute, the Court stated:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.
>
> There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average

per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. (*Id.* at 619-20. *Accord, Wolman v. Walter*, 433 U.S. 229, 254 (1977). ("[P]ublic school authorities will be unable adequately to insure secular use of field trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement.").)

With respect to the Pennsylvania statute, the Court stated:

> [T]he very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction. (403 U.S. at 620-21)

Earlier, in *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court had upheld the property tax exemption granted to certain church-owned property. The Court correctly concluded that there was far less government entanglement

involved in a tax exemption than in taxing the church. *Id.* at 674-77.

Most recently, in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), the Court affirmed the decision of the Seventh Circuit in refusing to uphold an NLRB assertion of jurisdiction over parochial schools. Although the Court based its decision on "the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board" (*Id.* at 501, 506-07), the opinion leaves no doubt that the NLRB assertion of jurisdiction threatened impermissible entanglement between the church and state. The Court stated:

> [I]t is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F.2d at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. *It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.* (440 U.S. at 502. (Footnote omitted; emphasis supplied.))

Many of the same entanglements the Court condemned in *Lemon* and *Catholic Bishop* are also present here. The incidents of entanglement inherent in the collection of unemployment tax and tax information include registration of the church with the Employment Development Department (*Cal. Unemployment Ins. Code* § 1086); maintenance by the church, for use by the State, of wage records and "such

other information as the director deems necessary"; submission by the church to the State of quarterly returns and reports for "covered" employees for each pay period, presumably including a separation of time spent performing "strictly church duties" (*Cal. Unemployment Ins. Code* § 1088); posting of printed statements at schools operated by the Synod's churches regarding benefit rights "and other matters as may be prescribed by authorized regulations" (*Cal. Unemployment Ins. Code* § 1089); investigations and audits to determine whether a particular employee is covered (for each pay period) and to determine whether an employee has performed "strictly church duties" for at least half of his working time (*Cal. Unemployment Ins. Code* §§ 1126-1132); reassessment proceedings to resolve any dispute as to whether a particular employee is performing "strictly church duties" (*Cal. Unemployment Ins. Code* §§ 1133-34, 1951-56); and collection of disputed taxes using court actions, tax liens, foreclosure proceedings and personal liability of pastors and other church officials. (*Cal. Unemployment Ins. Code* §§ 1701 *et seq.*)

Throughout the litigation until the time of trial the Secretary took the position that teachers in Category I and Category II schools were excluded only when performing "strictly church duties". (*See* Plaintiff's Trial Exhibit 33) Despite the importance of the Synod's schools to its religious mission, the Secretary decided that the operation of these schools did not amount to a "strictly church duty." In an apparent change of position, and in an apparent attempt to minimize the impermissible entanglement which pervades the unemployment tax scheme as interpreted, the Secretary took the position at trial that no services performed at church-operated schools could be "strictly church duties." (*See, e.g.*, Reporter's Transcript ("RT") at p. 127, lines

7-11) Even if one were to assume that the Secretary's *new*[7] "strictly church duties" test was understood and applied as described, impermissible entanglement is still inherent in the process. Counsel for the Secretary admitted that even under the "new" test it would be necessary for the church to separate (and presumably keep records) on a monthly basis for each employee, those services performed for "the school" from those services performed for "the church." (*See, e.g.*, RT at p. 128, line 21 to p. 129, line 19) Even if it were possible to determine whether a teacher spent

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[7]On at least five prior occasions the Secretary had taken a different position. For example, on May 23, 1979, at a hearing in this matter, Mr. Sheinfeld, counsel for the Secretary, took the position that all teachers of "secular" subjects were covered whereas a teacher of "religion" might not be covered. (*See* Reporter's Transcript of Proceedings, May 23, 1979 at p. 108, lines 22-25, "Certainly, a teacher who taught religion and the course was labeled 'Religion' and that is the only course they taught, you are going to run into a line-drawn [sic] situation, your Honor."; and p. 123, line 25 to p. 124, line 1, "We still say that a person teaching English or German or chemistry is a teacher and Congress intended that teachers be covered.") Mr. Raymond, counsel for the Secretary, took the same position—that teachers of certain subjects were excluded—in a hearing before the District Court on January 28, 1980. Likewise, the Secretary's writings prior to the trial assumed that certain teachers were exempt. Plaintiffs' Trial Exhibit 33, a letter dated April 18, 1978 from the Secretary to Bishop Kelly, contains the following language: "In light of the repeal of 3309(b)(3), we think the only services performed in the schools that may reasonably be considered within the scope of the exclusion permitted by 3309(b)(1) are those strictly church duties performed by church employees pursuant to their religious responsibilities within the schools." Plaintiffs' Trial Exhibit 34, a memorandum dated May 30, 1978 from the Department of Labor to All State Employment Security Agencies, contains almost identical language. Plaintiffs' Trial Exhibit 44, which is a memorandum from the Department of Labor to All State Agency Administrators states: "With respect to services performed in elementary and secondary schools that are church-related, some employment in the schools may be of a type that would come within the scope of the exemption permitted by section 3309(b)(1), FUTA, if the services performed are strictly church duties performed by church employees at the schools pursuant to their religious responsibilities." There is no evidence, other than Mr. Sheinfeld's statement at the trial, that the Secretary's position has changed from that repeated on at least the five prior occasions described above.

more time with a day school class than with the church youth groups, that a janitor spent more time cleaning the school than cleaning the house of worship, or that a secretary spent more time taking attendance than mailing church bulletins, the day-to-day surveillance involved in such a breakdown would itself violate the first amendment.

Appellants have no authority consistent with the Constitution to make such a decision because such authority would give the government impermissible power to encourage certain church activities and discourage others. The "strictly church duties" taxing standard places the religious content of plaintiffs' schools on trial and inappropriately thrusts the state governments into answering questions of religious doctrine, mission and values. The audits conducted by the State to collect and evaluate information to be used in assessing the tax allegedly due included inquiries regarding the content of instruction, the qualifications of the teachers, and the extent to which teachers are engaged in other than teaching activities. (*See* Plaintiffs' Trial Exhibit 18 and footnote 11, *infra*) The Secretary's witness, Mr. Streett, admitted on cross-examination that the hearing examiners in compensation hearings would make a determination as to whether an employee's duties were religious. (*See* Joint Appendix ("JA") at 177)

Appellants' inquiry into what is and what is not religious is a prohibited establishment of religion. As the Court stated recently in *New York v. Cathedral Academy*, 434 U.S. 125 (1977): "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once." *Id.* at 133. The Court reached the same conclusion in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), where the Court invalidated a solicitation statute

which required a local official to determine whether a cause was a religious cause.

The enforcement of the "strictly church duties" tax standard by the appellants carries the additional danger that the state may prefer one church over another and one religion over another. The activities performed by different churches and different religions are, by nature, not coextensive because different churches of the same religion and different churches of different religions perform activities which are unique to the doctrine of the sect and to the needs of the parish. One church or religion may prefer that its employees operate a school, another a choir and a third may prefer door-to-door solicitation. When the states are required in each instance to make evalulations of what duties constitute strictly church duties and tax the remainder, financial and administrative burdens will be imposed to different degrees, religion to religion, and state to state. The disparate treatment of religious activities engaged in by different churches and different religions smacks of the establishment of religion. If the first amendment means anything, it means that government may not "prefer one religion over another." *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

In summary, therefore, the Secretary's taxing standard and application of that standard is constitutionally unsound because that standard necessarily requires the state to make religious judgments forbidden by the first amendment.

2. The Benefit Eligibility Determination Process Must Result in Excessive Entanglement.

The tax collection process, however, is not the only entangling incident of the scheme. The State has admitted that teachers are hired by the Synod's churches to teach at the schools on the basis of their ability to pass along to enrolled students, by word and example, church doctrine. (*See* Pre-

Trial Conference Order, p. 15, ¶¶ 22-26) The Lutheran plaintiffs' evidence showed that a teacher is subject to dismissal if he fails to teach, by word or personal example, both inside and outside the classroom, the doctrine and principles of the Synod. (*See* Declaration of William Ray Hampton, p. 152; Declaration of Robert Dueker, p. 176; Plaintiffs' Trial Exhibits 1, 8, admitted into evidence at the trial of this action on August 12, 1980)

The amount of unemployment tax due from an employer is determined by the number of employees who have become eligible for unemployment insurance. The issue "most frequently disputed" in connection with claims for unemployment compensation is the reason for termination of employment. *California Department of Human Resources Development v. Java*, 402 U.S. 121, 126 (1971). This issue is extensively litigated because other states' laws, like California, uniformly provide for denial of benefits to employees who were discharged for "misconduct in connection with their work" or who voluntarily left employment "without good cause".[8] An individual is *presumed* to have been discharged for reasons other than misconduct in connection with his work and not to have left his work voluntarily without good cause. *Id.* (Emphasis supplied.) "Misconduct" has been defined in the applicable case law as limited to "willful, wanton, or equally culpable conduct" and does not include "mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or

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[8]Section 1256 of the *California Unemployment Insurance Code* provides that a person becomes ineligible for unemployment compensation "if the director finds that he left his most recent work voluntarily without good cause or that he has been discharged for misconduct connected with his most recent work."

discretion." *See, e.g., Jefferson v. California Unemployment Insurance Appeals Board*, 59 Cal.App.3d 72, 79 n.3, 130 Cal.Rptr. 405, 410 n.3 (1976).

In cases involving dismissal of a teacher for conduct or teachings at variance with church doctrine, the teacher would have the right to demand that the underlying reason for the unemployment be examined by the state unemployment agency. Federal law requires that the states provide an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3). Hearings in such cases would necessarily involve review of religiously motivated employment decisions of church officials, as well as inquiry into matters of church doctrine and practice.

Ernest Carter and Bernard Streett, employees of the United States Department of Labor, both testified that whether an employee has committed misconduct in connection with his work is a prominent issue at such hearings. (JA at 128-30, 178) Mr. Carter testified that "misconduct" occurs if an employee has "willfully violated his contract of hire and committed an act harmful to the employer's interests" (JA at 114); and that the determination of whether an act is harmful to the employer's interests is made by the hearing officer and may vary depending on the nature of the employer's business. (JA at 115-16, 123-24, 126)

Mr. Streett admitted that a contract of hire between an employer and any employee often is neither written nor oral and may contain implied terms. (JA at 131, 173, 179) The implied terms of hire may vary depending on the nature of the employer's business (JA at 179) and would differ from one church to another depending on the doctrine of the church. (JA at 179) The hearing examiner, however, determines what the implied terms of the contract of hire are

(JA at 179) and thus, implicitly, what the doctrine of the church is. The hearing examiner also decides the "reasonableness" of particular implied work rules (JA at 134) as well as whether the rule is enforced zealously. (JA at 146-48) In the event of a disagreement between a church employer and its employee over what constitutes church doctrine, the church must present evidence regarding what the doctrine of the church is. (JA at 134, 186)

Therefore, if the unemployment tax scheme is applied to religious schools, the government will inevitably be required to sit in judgment on whether or not a church employee, discharged because of an inability or failure to transmit church doctrine, is guilty of misconduct, or to sit in judgment of whether or not an employee who leaves voluntarily because of doctrinal differences has left "without good cause."

The same potential for chilling sensitive employment decisions of church authorities that existed in *Catholic Bishop* exists in this case. Church officials will be confronted with a choice of foregoing their right to discharge teachers who do not or cannot transmit church doctrine or of doing so "at the risk of a protracted and expensive unfair labor practice proceeding . . . which would certainly in part involve the Church's religious policies and beliefs." *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1124 (7th Cir. 1977), *aff'd* 440 U.S. 490 (1979).

A comparison of the present case with those in which the Court has found that government aid to sectarian schools did not give rise to sufficient entanglements to offend the first amendment further shows the impermissible nature of the entanglement in the unemployment tax scheme. *Tilton v. Richardson*, 403 U.S. 672 (1971) is the leading case regarding the extent of permissible entanglement. In *Tilton*, the Court upheld an act which provided federal construction

grants to private sectarian colleges. The grants were not to be used for "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity." The Court found three factors which "diminish the extent and the potential danger of the entanglement." *Id.* at 685.

The first factor was the "significant [difference] between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools," which included the fact that religious indoctrination was not a substantial purpose or activity of the colleges involved. Here, the evidence shows that the schools involved in this case are primary and secondary schools which are highly religious in orientation. Second, since the subject of the entanglement in *Tilton* was inanimate, *i.e.*, buildings instead of teachers, less surveillance would be required to ensure that the buildings were not used for a proscribed purpose. In this case, as in *Lemon*, the nature of the inquiries required by the eligibility determinations are inquiries directed to teachers and other church employees not to inanimate objects, and are, therefore, most subjective requiring greater surveillance. Third, the *Tilton* court explained: "There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact." *Id.* at 688. In this case, the entanglement, including audits, assessment proceedings and eligibility determinations, does not occur only once, as in *Tilton*, but rather are ongoing, as in *Lemon*.

The State argues that the Lutheran plaintiffs have shown no potential for excessive entanglement in the state benefit eligibility determination process because no evidence was

presented at the trial as to the method by which eligibility for benefits is determined under California law. Such evidence is unnecessary—the potential for excessive entanglement is amply demonstrated by the argument contained in the State's own brief.

At pages 21-22 of its amended brief, the State asserts:

> In determining whether an employee was discharged for misconduct the important factor is whether such employee failed to abide by an established work rule. Employers such as the appellees herein are of course free to establish any work rules they desire, including rules incorporating religious beliefs. A knowing violation of a work rule constitutes misconduct. The principal inquiry in a benefit eligibility hearing is not whether a given work rule conforms to Church doctrine but only whether the employee knew of the rule and nevertheless violated it. The benefit eligibility hearing could be conducted on a purely *secular* basis. (Footnote omitted. Emphasis in original.)

The above-quoted argument omits the initial inquiry which must be made: What was the "established work rule" which the employee is alleged to have violated? The question must be answered prior to deciding whether the employee knew of the rule and nevertheless violated it.

As the State has noted, the *church* as the employer "would have the burden of *proving what the work rule was* and that the employee knowingly violated it." (State's Amended Brief at p. 24) In determining what work rules, especially what implied work rules, have been "established" by a church, a hearing board will inevitably be called upon to decide what the doctrine of the church is to the extent the doctrine is itself the work rule. The only way to "prove" what a "work rule" is, where the applicable work rules include adherence to the doctrine of a church,

would be to present evidence as to the doctrine. The employee, presumably, would then have the opportunity to *disprove* that the rule allegedly violated was an "established work rule"—*i.e.*, to deny that the church adhered to a particular doctrine.

Although the State assures us that "[o]nce the religious employer demonstrated what was the work rule or church doctrine alleged to have been violated, the State would be bound to give effect to that work rule or church doctrine" (State's Amended Brief at p. 24), this "assurance" ignores the fundamental problem presented: the church must *prove* what its doctrine is.

The State's argument that entanglement will not result because the State is "foreclosed from determining the *truth*" of church doctrine (State's Amended Brief at p. 24) is a "red herring".[9] No one has suggested heretofore that the constitutional problem with the eligibility benefit determination process arises from potential adjudications of whether church doctrine is "true." The constitutional problem derives, rather, from the fact that an administrative agency will be called upon to determine (when the discharged employee denies that the church holds a particular doctrine) whether the church adheres to the doctrine in the first instance.

Furthermore, the State admits at footnote 13 of its amended brief that *the actual reasonableness* of a given "work rule" (*i.e.*, doctrine) is subject to review by the hearing board if it is considered "unreasonable" either "because compliance would impose a new and unreasonable burden on the employee," or "because it does not relate to or affect the employer's business interest." *See* 22 *Cal.*

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[9]The Secretary makes the same argument at pp. 28-29 of his brief.

Adm. Code § 1256-36(b)(1). Therefore, the hearing board has the authority under California law to decide that a particular religious doctrine is sufficiently "unreasonable" to excuse church employees from compliance! In sum, it is apparent that the California benefit eligibility process functions exactly as the federal witnesses testified that the process would function and that the California process is afflicted with the same unconstitutional entanglements.

The State contradicts itself as to the issues to be decided in the benefit eligibility hearing. After proclaiming repeatedly that the employer (church) must prove what the work rule (doctrine) was, the State reverses itself and states that only the employee's "understanding" of the doctrine need be adjudicated. (State's Amended Brief at p. 24)[10] Even if it were true (which it cannot be) that only the employee's conception of church doctrine mattered, constitutional problems are still presented. First, each time the church exercised its right to discharge a teacher whose understanding and

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[10]*Thomas v. Review Board*, 450 U.S. 707, 101 S.Ct. 1425 (1981), cited by the State in this connection, is inapposite. In *Thomas*, the Court overturned an Indiana ruling holding that a Jehovah's Witness who, for religious reasons, voluntarily terminated his employment at a weapons factory, was not entitled to unemployment compensation. The Court held that Thomas could not be compelled to choose between upholding his religious convictions and receiving state benefits. *Id.* at 1432-33. The Court did not hold that Thomas could be compelled to establish, to a hearing board's satisfaction, the requirements of his religion. The issue in *Thomas* was simply "whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion." *Id.* at 1431. In contrast, the issue in a discharge hearing is not what the employer's "honest conviction" might have been as to whether the employee violated an "established work rule." The question is whether the employee in fact *did* violate the work rule so as to be guilty of misconduct. Thus, while in *Thomas* no extensive inquiry into religious beliefs was necessary beyond establishing that the employee actually held a certain belief, in the instant situation the tribunal must decide whether the employer or the employee "more correctly perceived the commands of their common faith." *Id.*

effectuation of church doctrine did not comport with the church's position on the subject, the church would be subject to the unemployment tax. Second, the church would still be forced to prove what the church doctrine actually is, in an effort to prove that the employee could not reasonably have understood it to be anything else.

There is no room for doubt that eligibility hearings will involve the government in determining not only what is or is not church doctrine but also what is "important" or "reasonable" church doctrine. Such hearings would impermissibly intrude upon the "power [of religious institutions] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 722 (1976), quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

The State cites *United Methodist Council v. Superior Court*, 439 U.S. 1369 (1978), for the proposition that a civil court can determine on a "purely secular basis" whether an employee has "knowingly" violated an "established work rule." (State's Amended Brief at pp. 25-26) That case does not support the proposition of law for which it is cited. In *United Methodist Council* the issue was whether the General Council on Finance and Administration of the United Methodist Church was "doing business" in California so as to subject it to the jurisdiction of California courts. The case came before Mr. Justice Rehnquist alone on a petition for certiorari and a request for a stay. Justice Rehnquist held *inter alia* that a court does not violate the first amendment by deciding what the structure and actual mode of operation of a hierarchical church may be. Deciding how a church is structured, however, is a very different matter from deciding what the doctrine of that church might be. The State quotes from Justice Rehnquist's opinion stat-

ing that entanglement considerations "are not applicable to *purely secular disputes* between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged." (Emphasis supplied.) The quoted language does not suggest that determinations as to doctrinal matters are appropriate. A dispute over whether a teacher has violated church doctrine can hardly be characterized as a "purely secular dispute." Furthermore, neither fraud nor statutory violations would be involved in the benefit eligibility hearing process.

The "church property" cases cited by the State are similarly unsupportive of the State's contentions. *Jones v. Wolf*, 443 U.S. 595 (1979), involved a dispute resulting from a schism over the ownership of church property. Although acknowledging that church property disputes may be decided properly by a civil court applying "neutral principles of law," Justice Blackman, writing for the majority, emphasized that civil courts are absolutely prohibited from considering doctrinal matters. *Id.* at 603.

In *Maryland & Virginia Eldership, etc. v. Church of God, etc.*, 396 U.S. 367 (1970), also cited by the State, the Court upheld a Maryland decision as to the ownership of church property because the lower court reached its decision *without* inquiry into religious doctrine. *Id.* at 367-68. In his concurring opinion, Justice Brennan wrote: "[A] State may adopt any one of various approaches for settling church property disputes *so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.*" *Id.* at 368 (Brennan, J., concurring) (emphasis supplied). Justice Brennan stated that, although a civil court can determine ownership by studying deeds, reverter clauses, and state law, if a local church's constitution were to provide that local church property would

revert to the general church unless the general church had departed from church doctrine, the clause could not be civilly enforced. 396 U.S. at 370.

It was a determination that the general church had "departed from the doctrine" which resulted in the Court's reversal of a Georgia Supreme Court decision in *Presbyterian Church, etc. v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). The case had been submitted to the jury on the premise that state law implied a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice as they existed when the local churches became affiliated. The jury found for the local churches. Reversing the judgment, the Court stated:

> The Georgia courts have violated the command of the First Amendment. The departure-from-doctrine element of the implied trust theory which they applied requires the civil judiciary to determine whether actions of the general church constitute such a "substantial departure" from the tenets of faith and practice existing at the time of the local churches' affiliation that the trust in favor of the general church must be declared to have terminated. This determination has two parts. The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. *A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure*

was found. Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role. (*Id.* at 449-50. (Emphasis supplied.))

Just as the Georgia courts were prohibited from deciding whether the Presbyterian Church had "departed from the doctrine," the Employment Development Department is prohibited from ruling on whether an employee discharged by a religious school was discharged for "departing from doctrine."

3. The Mere Potential for Excessive Entanglement Is Sufficient to Offend the Establishment Clause.

The State argues that "concrete proof" that excessive entanglement will occur should be required. Plaintiffs need not show that excessive entanglement will occur to a certainty, nor must they show that excessive entanglement has already occurred.[11] The mere *potential* of excessive entan-

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[11]Nevertheless, the Lutheran plaintiffs have shown that such entanglement has already occurred with respect to the State's tax assessment procedure. The evidence admitted in this case shows the nature of the surveillance, interviews and record keeping which the State has attempted to require. In a letter addressed to the Synod's attorneys from Joseph L. Candelaria, an employee of the State (Plaintiffs' Trial Exhibit 18), the State made the following inquiries regarding the employees of Pilgrim Lutheran Church:

1. What services were performed by each individual?
2. Where were the services performed?
3. If performed for both the school and church, what was the percentage for each?
4. If any licensed, ordained, or commissioned minister(s) are listed above, what procedure is necessary to be licensed?
   a. Requirements
   b. Steps
   c. Time
5. Identify those employees as shown in various steps in (4b).

glement is sufficient to offend the establishment clause. *Meek v. Pittenger*, 421 U.S. 349, 371-72 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 615, 619-20 (1971); *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 76 (1st Cir. 1979); *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1126 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979). In *Catholic Bishop v. NLRB*, the Seventh Circuit stated:

> The whole tenor of the Religion Clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities only but *it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists*. (559 F.2d at 1126. (Emphasis supplied.))

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6. If number 4 above is applicable:
   a. Does service performed by a minister constitute the conduct of religious worship or the ministration of sacerdotal functions?
   b. Is the service performed pursuant to an assignment or designation by his ecclesiastical superiors?
7. Is lodging furnished to any of the above individuals?

The evidence presented to the District Court shows that the process involved in collecting the unemployment tax and unemployment tax information has caused governmental tax officials to become involved in and concerned with the day-to-day duties performed by those employed to operate plaintiffs' schools and has caused constant surveillance, personal interviews and voluminous record keeping regarding activities performed by those employed to operate the schools. The Lutheran plaintiffs' witnesses testified in their declarations (*See* Declaration of Dorothy E. White, pp. 2-3; Declaration of Ellen Quandt, pp. 4-5; Declaration of Sherryl Delto, pp. 6-7; Declaration of Nathanael P. Lucas, pp. 8-10, admitted into evidence at the trial of this action on August 12, 1980) that Mr. Candelaria had interviewed each of them, some on more than one occasion, with respect to the school operated by Pilgrim Lutheran Church. Other witnesses similarly testified in their declarations that they had been visited by auditors from the State. In each instance, the auditor sought information concerning the content of subjects taught and the qualifications of the teachers as well as financial information concerning the respective churches. (*See* Declaration of Laurita Wesling, p. 15, admitted into evidence at the trial of this action on August 12, 1980; Declaration of Wilma Weyand, p. 21, admitted into evidence at the trial of this action on August 12, 1980)

The burden of proof as to the constitutionality of the employment tax scheme lies with appellants. In *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979), the Roman Catholic President of the Inter-Diocesan Secretariat for Catholic Education of Puerto Rico challenged a regulation of the Department of Consumer Affairs under which that agency sought to collect financial and other information concerning the parochial schools. The regulation was directed toward curbing inflation in the commonwealth. The Court held that inflation control was not a sufficiently "compelling" governmental interest to justify the potential infringement of the plaintiffs' rights and stated:

> [I]n this case we are dealing with the gathering of information in a context where we cannot conceive—nor have we been apprised—of any rational end product use of this information which will not encroach on appellants' First Amendment rights.
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> It is not the obligation of the schools to prove as a precondition for relief at this time that this precise scenario, which hardly can be called speculative, in fact will unfold. To the contrary, in the sensitive area of First Amendment religious freedoms, the burden is upon the state to show that implementation of a regulatory scheme will *not* ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance. *In cases of this nature, a court will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems.* (604 F.2d at 75-76. (Emphasis supplied.))

B. The Unemployment Tax Scheme Violates the Free-Exercise Clause of the First Amendment.

The approach taken by the Court in "free exercise" cases is illustrated by *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, the Court overturned a South Carolina decision

in which a member of the Seventh-Day Adventist Church was discharged and denied unemployment benefits because she refused, owing to a religious belief, to work on Saturday. In describing the appropriate constitutional approach, the Court stated:

> If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . ." (*Id.* at 403. Cits. omitted.))

Later, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court, in invalidating a Wisconsin compulsory school attendance law, described the approach as follows:

> [I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. (*Id.* at 214.)

The uncontradicted evidence in this case showed that the operation of schools by the Synod's churches is "rooted in religious belief" and is an integral part of their religious mission. The Court has repeatedly recognized the primarily religious purpose underlying the operation of church-affiliated elementary and secondary schools. *See NLRB v. Catholic Bishop*, 440 U.S. 490, 503 (1979); *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975) (church schools have "predominately religious role"); *Lemon v. Kurtzman*, 403

U.S. 602, 628 (1971) (Douglas, J., concurring) ("the *raison d'etre* of parochial schools is the propagation of a religious faith"). The commentators have agreed that parochial school education is a protected "exercise of religion": "That parochial school education constitutes the practice of a legitimate religious belief has seldom been questioned. . . . In other words, the parochial schools are sufficiently religious to meet a constitutional test for a legitimate free exercise claim." Note, "The Free Exercise Clause, the NLRA and Parochial School Teachers," 126 *U. Pa. L. Rev.* 631, 641-42 (1978).

Applying the principles previously articulated by the Court to this case leads to the inescapable conclusion that the application of the unemployment tax scheme to individuals employed by churches to operate schools is unconstitutional. Application of the unemployment tax scheme would interfere with the Lutheran plaintiffs' operation of the schools and with their free exercise of religion in that it would: (i) interfere with the right of the churches to employ individuals to operate the schools who satisfactorily communicate the doctrine of the Synod and to discharge those who do not; (ii) interfere with the right of the churches to assign their employees to activities in furtherance of their religious mission; and (iii) impose an administrative and tax cost burden on the operation of an integral part of the religious mission of the Synod and its member churches. Furthermore, there is no compelling state interest sufficient to override the burden imposed by the unemployment tax scheme on the free exercise of religion.

1. Application of the Unemployment Tax Scheme Would Interfere With the Right of the Churches to Employ Individuals Who Satisfactorily Communicate Church Doctrine.

As set forth above, state laws uniformly provide that an individual is ineligible for unemployment benefits if he has been discharged for "misconduct" in connection with his

work. Unless an employee quits voluntarily "without cause" or is discharged for "misconduct", the employer is liable for the unemployment tax.[12] *See Cal. Unemployment Ins. Code* § 1256. "Misconduct" does not encompass "mere inefficiency, unsatisfactory conduct, [or] failure in good performance as the result of inability or incapacity." *Jefferson v. California Unemployment Insurance Appeals Board*, 59 Cal.App.3d 72, 79 n.3, 130 Cal.Rptr. 405, 410 n.3 (1976). Both Mr. Carter (JA at 136) and Mr. Streett (JA at 187) testified that incompetence does not constitute "misconduct".

Therefore since the tax is computed according to the number of an employer's employees who have become eligible for unemployment compensation, application of the unemployment tax scheme would inhibit the schools from: replacing graduates of other colleges with graduates of colleges operated by the Synod; replacing teachers who are not members of the Synod with those who are; replacing teachers who are not members of the church with those who are; or replacing teachers who do not or cannot satisfactorily communicate the doctrine of the Synod. For each of these decisions, the church school would be required to pay additional unemployment tax.

2. Application of the Unemployment Tax Scheme Would Interfere With the Right of the Churches to Assign Their Employees to Activities in Furtherance of Their Religious Mission.

The Secretary's interpretation is that only persons performing "strictly church duties" are exempt from coverage. (*See* Plaintiffs' Trial Exhibit 33 and footnote 7, *supra*) Per-

[12]Two methods of financing the unemployment tax are available to those nonprofit employers required to pay the tax. The "reimbursement method," available only to nonprofit employers by election, allows the employer to pay tax only after and in an amount equal to benefits paid. *Cal. Unemployment Ins. Code* §§ 801 *et seq.* The "tax rate" method requires regular contributions according to tax schedules. One factor in the schedules is the employer's experience for prior years. *Cal. Unemployment Ins. Code* §§ 901 *et seq.*

sons employed by the churches routinely perform both what the Secretary has deemed to be "strictly church duties" and what he has deemed to be not "strictly church duties." Section 3306(d) of the *Internal Revenue Code* provides:

> [I]f the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment.[13]

In order to avoid the unemployment insurance tax with respect to particular employees, the churches will have to exercise care to see that a "strictly church duties" employee does not spend too much time on what *the government does not consider to be* "strictly church duties"; and will be encouraged to see that all employees spend more time doing "strictly church duties." In addition to the obvious tendency to encourage certain exercises of religion and discourage others, such a standard interferes with the church's decisions with respect to the allocation of personnel according to what it believes to be in furtherance of its religious mission.

This burden becomes all the greater when combined with the requirement that a determination of whether services of any employee are employment within the meaning of the unemployment insurance acts must be made for *each* pay period of each employee. *See, e.g., Reliable Life Insurance Co. v. United States*, 356 F.Supp. 235, 238-39 (E.D. Mo. 1973).

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[13]The California equivalent is Section 607 of the *California Unemployment Insurance Code*.

3. Application of the Unemployment Tax Scheme Would Impose an Administrative and Tax Burden Upon the Operation of an Integral Part of the Religious Mission of the Synod and Its Member Churches.

In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), cited by the State in support of its argument, the Court held that a license tax upon the exercise of religious activities is unconstitutional on its face as a direct restriction of the free exercise of freedoms which are protected by the first amendment. In that case, a Pennsylvania ordinance required all persons canvassing or soliciting orders for goods or merchandise of any kind to pay a fee and to procure a license to transact such business. Petitioners were Jehovah's Witnesses who went from door to door distributing literature and soliciting people to purchase certain religious books and pamphlets. In determining that the ordinance was unconstitutional as applied to the Jehovah's Witnesses, the Court reasoned that a tax upon a religious activity is different from tax upon income and property of religious institutions and employees who operate such institutions. The latter taxes are, in some instances, valid while the former is not. A tax upon a religious activity is prohibited because it (1) confers power on government to control or suppress a particular activity by requiring the individual to purchase the enjoyment of the activity which is protected by the Constitution; and (2) acts as a prior restraint to censor the activity at the outset. Since the nature of the tax was dangerous in itself, it was unnecessary to prove that the tax did *in fact* suppress or control the religious activity in question. *Id.* at 112-14.

The decision in *Murdock* was reinforced with *Follett v. McCormick*, 321 U.S. 573 (1944), which the State has also cited. In *Follett*, the Court held that a municipal ordinance which imposed a license tax on books was unconstitutional as violative of the free-exercise clause of the first amend-

ment as applied to an evangelist who distributed religious literature in his home town and made his livelihood from such activity. The Court relied extensively upon the analysis developed in *Murdock* and elaborated:

> The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious (*Grosjean v. American Presso Co., and Murdock v. Pennsylvania, supra*) as the imposition of a censorship or a previous restraint. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357. For, to repeat, "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment."
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> This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case. [Cit. omitted.] But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege. (321 U.S. at 577-78.)

The analysis applied by the Court in *Murdock* and *Follett* to declare license taxes upon religious activities unconstitutional is applicable here. Like the tax imposed in *Murdock* and *Follett*, the unemployment tax in this case is a direct financial restraint upon the Lutheran plaintiffs' right to engage in religious activities which are protected by the Constitution. The unemployment tax scheme directly restrains these activities in at least two respects: First, if incompetence or inability to teach church doctrine is not "misconduct," requiring the Lutheran plaintiffs to pay the tax is the equivalent of requiring the churches either to purchase from the

State the right to preserve church doctrines through the employment of individuals who satisfactorily communicate that doctrine, or to continue to employ teachers who do not satisfactorily communicate the doctrine. Second, to require the churches to pay the tax would infringe upon decisions of those churches regarding the assignment of duties to employees. The churches may purchase from the government the right to assign duties, in furtherance of their religious mission, which are, in the view of the government not "strictly church duties" or they may assign duties to minimize payment of the tax.

The State argues that the Lutheran plaintiffs have not shown sufficient "interference" with their exercise of religion. In making this argument, the State apparently assumes that financial burden can never provide the requisite "interference" and has failed to address the precise nature of the injury and interference alleged by plaintiffs. The State has cited *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961), for the proposition that to the extent that the Lutheran plaintiffs are claiming that the unemployment tax constitutes a financial burden, no free exercise claim can be made merely because the imposition of the unemployment tax scheme would render the practice of religion more expensive.[14] In the first place, *Braunfeld* does not stand for the proposition advanced by the State, and in the second place, the Lutheran plaintiffs have not based their interference argument on either a "mere increase in expense" or on a contention that no tax can be applied to religious activities.

The plaintiffs in *Braunfeld* were Orthodox Jews who challenged a Pennsylvania Sunday closing law, contending that because their day of rest was Saturday, the inability to open their business on Sunday worked an economic hardship and

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[14]The Secretary makes the same argument at pp. 34-35 of his brief.

thus, made the exercise of their religion more expensive. The Court did not hold that the financial impact was not an interference with the plaintiffs' practice of religion, but rather that the governmental interest was sufficiently compelling to justify the incidental burden on the exercise of religion. In fact, the Court has previously stated that the taxing power may be used so as to infringe upon the free exercise of religion. *Flast v. Cohen*, 392 U.S. 83, 104 n.25 (1968).

The principal distinction between *Follett* and *Murdock*, where taxes on religious activity were stricken, and the cases cited by the State, is the nature of the religious activity affected by the tax. In *Follett* and *Murdock*, as in the present case, the affected activity was the dissemination of the doctrine of the religion and thus, the functional equivalent of preaching.[15] In *Follett* and *Murdock*, the method of communicating the doctrine of the religions was door-to-door sales of literature and the impermissible tax was a license tax on door-to-door salesmen. In the case of schools operated by churches, the method chosen to communicate the religious doctrine is a school and the tax is imposed because of the Synod's choice to communicate its doctrine through classroom teachers who are capable of communicating the doctrine.

4. No Compelling State Interest Has Been Shown.

The State insinuates that any time a statute is passed by a state or the federal government for the promotion of the health, safety, and general welfare, the benevolent purpose

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[15]Thus, in *Murdock* the Court stated: "The Supreme Court of Iowa . . . described the selling activities of members of this same sect as 'merely incidental and collateral' to their 'main object which was to preach and publish the doctrines of their order.' [Cits. omitted.] That accurately summarizes the present record." 319 U.S. at 112.

behind the statute is sufficient to excuse any burden it may impress upon the free exercise of religion. (*See* State's Amended Brief at p. 29) It is not. Once it is determined that a regulation imposes a burden on the free exercise of religion, as is the case here, the regulation can be upheld only if the government is able to show a "compelling state interest." *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.' "). The Court in *Sherbert* explained what was required by way of a compelling state interest:

> [T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." [Cits. omitted.] *The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.* (*Id.* at 402-03. (Emphasis supplied.))

Furthermore, the government *must* show that it has chosen the least restrictive alternative—that it can reach the alleged evil by no other device. *Thomas v. Review Board*, 450 U.S. 707, 101 S.Ct. 1425, 1432 (1981).

The record is entirely devoid of any showing whatsoever that any compelling governmental interest requires unemployment tax coverage of persons employed by churches to operate schools. There is not one shred of evidence with respect to rampant unemployment, poverty or social hardship of any kind among this group, much less any "threat to public safety, peace or order." Likewise, there is no

assertion, nor any evidence, that the governmental objective cannot be accomplished by a less restrictive alternative.

Some very important state interests have not risen to the necessary "substantial threat to public safety, peace or order" standard. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (discouragement of illicit sexual conduct, ensuring safety of medical procedures, and protection of pre-natal life); *Wisconsin v. Yoder*, 406 U.S. 205, 221-29 (1972) (compulsory education); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976) (minimum standards for schools). Here, no compelling governmental interest exists. There is no "substantial threat to public safety, peace or order" posed by exempting all church employees from unemployment or disability insurance coverage. Indeed, they were so exempted without damage to public safety, peace, or order until the Secretary's ruling in April 1978.[16]

C. 28 U.S.C. Section 1341 Does Not Bar the Relief Granted in This Case.

The Secretary has asserted that this action should have been dismissed pursuant to the terms of the Tax Injunction Act, 28 U.S.C. Section 1341. That statute provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." By its terms Section 1341 relates only to injunctions against the state and state taxes. The

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[16]Although, as the State notes at p. 19 of its amended brief, parochial school employees were covered under the temporary Special Unemployment Assistance Program, P. L. 93-567, 88 Stat. 1850 ("SUA"), "[b]ecause such non-profit schools were not subjected to any tax liability under the SUA program, there was no occasion to consider constitutional implications of the legislation." (Recommended Decision of Administrative Law Judge in Alabama-Nevada Conformity Proceeding, Plaintiffs' Trial Exhibit 41 at p. 4)

exception to Section 1341, where no "plain, speedy and efficient remedy may be had in the courts of such state" is applicable here and allows this Court to adjudicate this entire controversy and grant both declaratory and injunctive relief as to the State. *See Independent Baptist Church v. Tennessee*, 468 F.Supp. 71 (E.D. Tenn. 1978).

The Lutheran plaintiffs brought this action in state court. The Secretary removed the action to the District Court. The state court remedy available to the Lutheran plaintiffs is inadequate first because the Lutheran plaintiffs cannot force the Secretary to stand suit in state court. In *United States Steel Corp. v. Multistate Tax Commission*, 367 F.Supp. 107 (S.D.N.Y. 1973), the court denied defendants' motion to dismiss brought pursuant to Section 1341. One basis for the court's denial of the motion was that the plaintiffs could not obtain jurisdiction over all proper parties in the state courts: "In a situation where plaintiffs may not be able to obtain jurisdiction over the proper parties, the state declaratory judgment remedy can hardly be said to be adequate." *Id.* at 116.

Furthermore, the state remedy suggested by the Secretary is an action for refund brought after the disputed tax is paid. Such a procedure would have required at least 104 separate actions in the state court against the State as well as an action in the federal court against the Secretary for the Lutheran churches alone. In *United States Steel Corp.*, 367 F.Supp. 107 (S.D.N.Y. 1973), the court held that:

> The necessity for such a multiplicity of actions cannot by any stretch of the imagination be considered a viable alternative to federal suit, but rather, falls into that category of state remedies which are considered "unduly burdensome". Georgia R. R. & Banking Co. v. Redwine, *supra*, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335.

This interpretation of the statute is supported by the case of Matthews v. Rodgers, 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932), cited by defendants. The Court in *Matthews* refused to grant plaintiff taxpayers an injunction against a state taxing authority where they had an adequate remedy under state law by paying the tax and suing for a refund. In particular, the Court held that the state remedy was adequate *precisely because* each taxpayer would only have to bring one suit to vindicate his rights as a taxpayer. The Court indicated, however, that federal equity jurisdiction would obtain if plaintiffs would have had to bring numerous suits to vindicate their rights:

> "In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties, involving the same issues of law and fact." *Id.* at 529-530, 52 S.Ct. at 221.

Cases decided after the passage of the present version of § 1341 have sustained federal jurisdiction where the alternative state remedy involved a multiplicity of suits. *See Georgia R.R. & Banking Co. v. Redwine, supra,* 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335; Louisville & Nashville R. R. v. Public Service Commission, 249 F.Supp. 894 (M.D. Tenn. 1966), aff'd, 389 F.2d 247 (7th Cir. 1968). (367 F.Supp. at 115-16)

In refusing to grant defendants' motion to dismiss pursuant to Section 1341, the court stated the law with respect to uncertain state remedies: "Where . . . the adequacy of the state court remedy is uncertain, there is no 'plain' state remedy and the federal court can exercise jurisdiction under § 1341." *Id.* at 117. In this case, the state remedies are uncertain not only because of the unavailability of the Secretary and the multiplicity of suits but also because of the

existence of Section 1851 of the *California Unemployment Insurance Code* which prohibits generally the use of equitable relief to prevent the collection of contributions for unemployment or disability insurance.[17]

Moreover, the very process of collecting the unemployment and disability insurance taxes deprives the Lutheran plaintiffs of a personal liberty. In *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966), *cert. denied*, 386 U.S. 1033 (1967), the Seventh Circuit considered the issue of whether an alleged constitutional violation created an exception to the Tax Injunction Act. The court stated: "In the instant case, we have no claim of the denial of procedural due process. Plaintiffs do not complain of the method of assessing or collecting the tax. They complain of the tax itself." 371 F.2d at 175. The Lutheran plaintiffs do complain that the methods of assessing and collecting the taxes in question infringe the personal liberties guaranteed to them by the first amendment.

Because of the reasons set forth above with respect to ability to obtain jurisdiction over proper parties in one action, and because of the multiplicity of actions which would result and the uncertainty of state court relief, if Section 1341 were to act as a bar to the Lutheran plaintiffs' assertion of their first amendment rights before the District Court, that section would be unconstitutional.

The Court has previously held that where a statute passed pursuant to an otherwise valid congressional power, inter-

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[17]That section provides:

No injunction against collection

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin the collection of any contribution sought to be collected under this division. *Cal. Unemployment Insurance Code* § 1851.

feres with first amendment rights, the interests protected by the statute must survive a test of "exacting scrutiny". *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). ("This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 64-65.) In such an instance, government regulation of conduct is justified only if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of [first amendment] freedoms." 424 U.S. at 25.

In this controversy, there is no interest served in denying jurisdiction based upon Section 1341. If the Court holds that the District Court did not have jurisdiction of this controversy, the Lutheran plaintiffs will be hindered in the vindication of their first amendment rights. It is a constitutional imperative that the Lutheran plaintiffs have reasonable access to the courts to vindicate their constitutional rights. *White v. Ragen*, 324 U.S. 760 (1945); *Hooks v. Wainwright*, 352 F.Supp. 163, 166 (M.D. Fla. 1972); *Gilmore v. Lynch*, 319 F.Supp. 105, 109 (N.D. Cal. 1970), *aff'd*, 404 U.S. 15 (1971); *Konigsberg v. Ciccone*, 285 F.Supp. 585, 596-97 n.5 (W.D. Mo. 1968), *aff'd*, 417 F.2d 161 (9th Cir. 1969), *cert. denied*, 397 U.S. 963 (1970), citing *Ex parte Hull*, 312 U.S. 546 (1941); *DeWitt v. Pail*, 366 F.2d 682 (9th Cir. 1966). Therefore, the Court should hold that the District Court had jurisdiction over the suit out of which this appeal arises.

III.
CONCLUSION.

For the foregoing reasons, the Lutheran plaintiffs respectfully urge the Court to dismiss the appeal herein and to affirm the judgment of the District Court.

Respectfully submitted,

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